NO. 85-2016

Supreme Court, U.S.
FILED
MAY 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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WAYNE T. OWENS, Petitioner

v.

THE BALTIMORE & OHIO R.R. CO., Respondent

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ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS OF MARYLAND

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# PETITION FOR A WRIT OF CERTIORARI

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INPROPER PERSON

39pp

## QUESTIONS PRESENTED

1. Whether the charge of "employment discrimination because of a physical condition, "filed by the petitioner against his employer, the Baltimore & Ohio R.R. Co. was timely filed.

2. Whether the act of denying the petitioner, his return to active employment, was a single and complete act (a one time occurence) or was it a continuing act, that has occurred and continues to occur each day the company continues to deny the petitioner his return to employment.

INDEX


| | PAGE |
|---|---|
| Questions Presented | I |
| Opinion Below | 4 |
| Jurisdiction | 4 |
| Statutory Provisions Involved | 5 |
| Statement of the Case | 5 |
| Reasons for Granting of Writ | |
| 1. The Decision Below Conflicts with Supreme Court Language and Findings, that there are Illegal Acts that are Deemed "Continuing" | 10 |
| 2. The Decision Below Affords an Umbrella of Protection, or Loophole, for Illegal and Discriminatory Acts, and Circumvents the Spirit and Intent of the Law | 11 |
| 3. It Would Be In the Public Interest for This Writ to be Granted | 12 |
| Conclusion | 13 |
| Appendix | |
| (A) Opinion of Baltimore Community Relations Commission Public Hearing | APP-1 |
| (B) Opinion of Master Tockman of Baltimore Circuit Court | APP-6 |
| (C) Opinion of Judge Marshall Levin of Baltimore Circuit Court | APP-16 |

INDEX, Continued


| | PAGE |
|---|---|
| Appendix, Continued | |
| (D) Opinion of Court of Appeals of Maryland | APP-20 |
| (E) Medical Examination, Canton R.R. Co. | APP-21 |


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CITATIONS


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| Mobley v. Acme Foods, 473 Fed. Supp 851, Page 857, Par. B (6&7), Continuing Violation | C-1 |

Now comes the petitioner, Wayne T. Owens, to plea The Honorable Supreme Court of the United States of America, to issue a Writ of Certiorari to review the opinion and judgement of The Court of Appeals of Maryland, petition docket no. 562, September Term, 1985. Entered on March 10, 1986.

## OPINION BELOW

The opinion of The Court of Appeals of Maryland, and the District Court of Baltimore, Maryland, neither of which were published, appear in the Appendix hereto.

## JURISDICTION

The judgement of the Maryland Court of Appeals was entered on March 10, 1986, and this petition of Certiorari is filed within 90 days of that date.

## STATUTORY PROVISIONS INVOLVED

Article 4, of The Baltimore City Charter, clearly and undisputibly declares that it is illegal for a company doing business in the City of Baltimore, to discriminate in employment practices because of a physical condition of a employee, or applicant for employment.

## STATEMENT OF THE CASE

Owens, and employee of the Baltimore & Ohio R.R. Co., suffered serious injuries in a off duty traffic accident.

Owens was hospitalized and underwent extensive and numerous surgeries to repair the sustained injuries. In accordance with the Labor Management Agreement in effect at the B & O R.R. Co., Owens was placed on sick leave status with his employer and would remain in that status until such time that his recuperation allowed him to return to active employment status.

When it was decided by the Orthapedic Specialists that performed the surgery and follow-up treatment of Owens, that he was physically able to return to the physical duties of his job, he was released to return to work.

Upon presenting himself along with the Surgeons Release, to the B & O R.R. Co., the company through it's medical department would not allow Owens to return to work at that time. But there was the possibility that at a later date he would be re-examined, re-evaluated and another decision would be made at that time , to either allow Owens to return to work, or continue to deny him return to active employment.

This action in no way severed or terminate the employmentof Owens, he continued in the employment of the railroad, maintaining his position on the yearly postings of the company

seniority roster, and would resume as an active employee when the company's medical department was finally satisfied and in agreement with Owens' doctor that he was able to return to work. Subsequent visits to the company's medical department failed to alter their opinion of Owens' ability to funciton as a machinist at Riverside Shops, the Diesel Repair Facilities of the B & O R.R. Co. in Baltimore, Maryland.

In 1978, Owens had come aware of an employment opening, as a machinist with the Canton R.R. Co. of Baltimore, MD. Owens applied for the job, noting his prior injuries on the employment application, and was examined by the medical department for the Canton R.R. Co. was declared physically fit and was hired as a machinist at the Diesel Repair Facility of the Canton R.R. CO. Owens accepted the job and became an employee of the Canton R.R.

Ownes felt that being able to pass a physical with this railroad for the job of machinist, would most surely convince

the B & O R.R. Co. medical department that they had misjudged him. So he again presented himself to the B & O R.R. Co. and expressed his desire to return to his job with them.

He was again examined by the B & O R.R. Co medical department, and again turned down. It was at this time Owens felt that the B & O R.R. Co. had no intention of ever admitting he was physically able to return to work. Since Owens felt that by passing a physical on anotner railroad for identical position (machinist) he had proven his physical capabilities, and by the B &O) R.R. Co. still denying return to work, that now, they were being discriminatory, and he filed charges of discrimination against the company, through the Baltimore Community Relations Comminssion, since the Baltimore City Charter, ART-4, makes such an act illegal in Baltimore.

After extensive investigation, findings and repeated efforts to resolve the matter with the B & O R.R. Co., the Baltimore Community Relations Commission, finally brought the matte

to a Tribunal Public Hearing.

The decision of the public Hearing, was that in fact the B & O R.R. Co. "was guilty of discrimaiton," and ordered to return Owens to active employment.

The B & O R.R. CO. ignored the order of Baltimore City Community Relations Commission. The Commission through its legal arm, The City Solicitors office, sought compliance, the railroad resisted, and the matter was heard before Master Shirley Tochman of the Baltimore City Court, the Master upheld the order of the Community Relations Commision. The case then went before Judge Marshall A. Levin of Baltimore Circuit Court, who ruled that the charge was time barred because it was not filed within 180 days, he ruled in this manner even though the issue of "timely filing" had been addressed by the Community Relaations Commission Public Hearing, and Master Tockman, in both instances it was ruled that Owens' Charges of Discrimination were timely filed and for that matter in fact not time-barred.

The petition seeking enforcement of the order was filed on November 30, 1983. Given the deliberately vague and flexible standard chosen by the City Council, it is not appropriate to read into the ordinance a definite time period based on analogies from other administrative agencies. The two-year delay is unusual and may be considered at trial according to normal estoppel principles. Since prejudice to the employer base on the delay is a factual matter, this objection cannot be resolved on the pleadings.

The final objection noted by defedant is that Owens is not within the class of person afforded protection by Article IV of the City Code. Section 10 of Article IV prohibits employment discrimination based on "race, color, religion, national origin, ancestry, sex, age, or physical or mental capacity." Physical disability is defined in seciotn 9(13) of Article IV as "any physical condition, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, trama, or illness . . ." The fact that Owens in his complaint states that he is physically able to work as a mechanic and has been employed by other companies in that capacity does not negate his charge that

defendant refused to reinstate him based on the employer's perception that he was not physically disqualified.

Counsel during argument on the motion referred to the testimony and exhibits presented to the Community Relations Commission. Plantiff's contention that the employer rejected Owens because he might be more susceptible to injury due to residual ankle problems sounds much like the complaint of discrimination considered in B & O Railroad v. Bowen, Csa, No. 1595, Sept. Term 1983, Daily Record, Nov. 13, 1984. The court affirmed a back pay award by the State Commission on Human Relations to a rejected job applicant. The company had reject Bowen based on its doctor's opinion that the applicant would suffer a back injury on the job because he had a bullet lodged in one vertebrae. Teh applicant had received a gunshot while serving in the Army. At issue was the burden of proof. The Court of Special Appeals held that once a prima facie case is establish ed the employer has the burden to show a "resonable probability" of future hazard to the employee's

health or safety because of the handicap. The existence of a handicap was assumed based on the reason given by the employer for rejection of the applicant. Whether a physical condition as defined in Article IV of the City Code constitutes funcitonal handicap is a matter of proof. Owens was perceived by the employer as being handicapped because of a physical condition. Therefore, Owens falls within the protected class under the city ordinance.

Rule 2-541 (h) allows ten (10) days from the date of filing of this Report and Recommendation for exceptions.

_____ _____

Date of filing and mailing

General Master

| | | |
|---|---|---|
| BALTIMORE COMMUNITY RELATIONS COMMISSION | ) | IN THE |
| | ) | CIRCUIT COURT |
| VS. | ) | FOR |
| BALTIMORE AND OHIO RAILROAD COMPANY | ) | BALTIMORE CITY |
| | ) | CASE: 83334006/E13758 |

ORDER

No exceptions having been filed and the Report and Recommendaiton of the General Master having been reviewed and approved, theis Court adopts the Report and Recommendaiotn as its Opinion. It is this _____day of _____, 1984 by the Circuit Court for Baltimore City.

ORDERED that the motion to dismiss is granted unless the Mayor & City Council of Baltimore is substituted as plaintiff in place of the Baltimore Community Relations Commission;

ORDERED that the preliminary objection to subject matter jurisdiction is denied.

_____
Judge

APPENDIX C

| | | |
|---|---|---|
| BCRC | ) | IN THE |
| AND | ) | CIRCUIT COURT |
| WAYNE OWENS | ) | FOR |
| PETITIONERS | ) | BALTIMORE CITY |
| V. | ) | 83334006/E13758 |
| THE B & O R.R. CO. | ) | |
| RESPONDENT | ) | |

MEMORANDUM OPINION AND ORDER

1.

The petition of the BCRC should be dismissed because it must be brought in the name of the "Mayor and City Council of Baltimore" and it has not been. It has been brought in the name of the "BCRC."

However, counsel informed this Court that the petition shall be amended to be brought in the proper name, i.e., "Mayor and City Council of Baltimore City." Hence the petition will not be dismissed for this reason.

The petition must be dismissed because it was not brought "within 180 days of (such) alleged unlawful proceeding." Art. IV, Sec. 16 (5) of the Baltimore City Code. It may have been actually brought within 180 days of B & O determination in 1978 that Owens was unfit to return to work, if that determination is considered to be a discriminatory act, i.e., an "unlawful practice." But it was not timely brought. B & O determined that Owens was not able to work in 1962 when it placed him on open-ended disability leave of absence. Again in 1966, B & O determined that Owens could not return to work (because he still had "hardware" in his leg). In 1971, the hardware was removed but Owens made no move to seek reinstatement until 1978.

It is true that Owens did not have a right to complain about disability discrimination until 1976, the year Article IV was amended. But it is equally true that the acts of the B & O in refusing to rehire Owens were not unlawful prior to 1976. When the ability to complain about an unlawful practice arose in 1976, Owens could

then have re-applied. He then had no hardware in his leg. But he waited until 1978 to complain. His complaint dealt with a situation that had existed since 1962.

The argument that B & O's failure to rehire (or recall) is not tenable. In layoff cases, the Courts have rejected this theory. Law v. United, 519 F. 2d 171 (10th Circuit 1975) (age discrimination); United v. Evans, 431 U.S. 553 (1977) (gender discrimination); Mobley v. Acme, 473 F. Supp. 851 (D. MD 1977).

Assuming that the refusal of B & O to recall Owens in 1962 and 1966 were "unlawful practices" Owens failed to seek reinstatement until 1978. I the 180 day clock runs from 1978 why may it not r until1988 or even 1998? If he felt that B & O wa quilty of an unlawful practice when it was first possible to complain about such unlawful practice in 1976 he should have sought recall then. He kne or should have known that the refusal of B & O to recall him was an unlawful practive. If he wanted to put B & O to the test, he should have

applied for recall. It may well have been that B & O would have recalled him. After all, the hardware had been removed. If not, then he had 180 days to assert the unlawful practice. Since he did not do so in 180 days he is to late.

Marshall A. Levin
Judge

This document has been altered by eliminating Judge's signature

APPENDIX D

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| WAYNE T. OWENS<br><br>V.<br><br>THE BALTIMORE AND OHIO RAILROAD COMPANY | IN THE<br>COURT OF APPEALS<br>OF MARYLAND<br>Petition Docket No. 562 september Term, 1985<br>(No. 329, Septmeber Term, 1985 Court of Special Appeals) |

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeal in the above entitle case, it is

ORDERED, by the court of Appeals of Maryland that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desireable and in the public intere

/S/ Robert C. Murphy
Chief Judge

Date: March 10,1 986

APPENDIX E

**CENTRAL MEDICAL CENTER,**

Northpoint Boulevard
ore, Maryland 21224

16 S. Eutaw Street
Baltimore, Maryland 21201

11350 McCormick Road
Hunt Valley, Maryland 21031

DATE 8-21-79

**EMPLOYMENT & RETURN TO WORK APPROVAL SLIPS**

Name: Carlton Lockard

Name: Wayne Thomas

above person was examined in this office today and is ~~is not~~ approved for

(X) Employment ( ) ~~Return to Work~~

Pending results of blood test

Pending results of Chest, L.S. Spine X ray

Pending results of EKG

With the following restrictions

Pending results of Chest & Lumbar Spine

DR'S. SIGNATURE Elliott L. Fischoff, M.D.

# CITATIONS

Mobley v. Acme Foods, 473 Fed. Supp 851, Page 857 par. B (6 & 7), Continuing Violation

**********

(b)

Continuing Violation

(6 & 7) Plaintiff next contends that his claim of a discriminatory layoff constitutes a continuing violation of Title VII and thus is not barred by limitiations. This Court is satisfied that this contention is without merit.

It is well settled that a typical layoff is not a continuing violation but is a completed act at the time it occurs. See e.g., Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118, 1120 (9th Cir. 1973), cert. denied, 414 U.S. 359, 49 S. Ct. 69, 38 L.Ed.2d 109 (1973). As was recently made clear in United Air Lines, Ince. v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977):

> ...the emphasis should not be placed on mere continuity (of impact from the act of discrimination); the critical question is whether any present violation exists. (Emphasis in original) 431 U.S. at 558, 97 S. Ct. at 1889.

Most often, continuing violation are found where the plaintiff alleges a failure to hire or promote followed by the hiring and promotion of others. See Moore v. Sunbeam Corp., 459 P. 2d 811, 828 (7th Cir. 1972); Law v. United Air Lines, Inc. 519 F.2d 170 (10th Cir. 1975). Another typical continuing violation is the payment of a discriminatory wage. See, e.g., Corbin v. Pan American World Airways, Inc., 432 F.Supp.939 (N.D.Cal.1977). What these violations have in common is thatthey repeat Title VII. See Moore v. Sunbeam Corp., 459 F.2d 811, 828 (7th Cir. 1972); Law v. United Air Lines, Inc., 519 F.2d 170 (10th Cir. 1975). Cf. United Air Lines v. Evans, 431, U.S. 553, 558 97 S. CT. 1885, 52 L. ED. 2d 571 (1977).

Accordingly, for the reasons state, this Court will deny plaintiff's motion for reconsideration of the Court's Order of June 1, 1979, insofar as such Order dismissed plaintiff's individual claim of discrimination with respect to hiring.

The finding of the Court of Appeals of Maryland affirmed the judgement of the District Court of Baltimore City.

## REASONS FOR GRANTING WRIT

### 1. THE DECISION BELOW CONFLICTS WITH SUPREME COURT LANGUAGE AND FINDINGS, THAT THERE ARE ILLEGAL ACTS THAT ARE CONTINUING IN NATURE.

The Supreme Court in Evans v. U.S. Airline and Mobley v. Acme Foods, said that lay-off situations are single and complete acts and therefore are bound by the 180 day clock, but went on to say that there are cases of illegal action that are deemed to be continuing in nature and cited such as; denying employment while hiring and promoting others, and since th type of act is continuing in nature, the 180 days statues are not applicable. See Moore v. Sunbeam Corp. 459 F2d811 and Law v. United Air Lines 529 F2d170.

Since Owens was not laid off by the B & O R.R. Co. the single and complete act mentioned above does not apply in this case, but rather, since Owens was continually disqualified

on numerous visits to the B & O R.R.Co. medical department, and during this time the company hired others to perform the work of Owens, and promoted others, that the act is continuing, and therefore any time statues for filing charges would be null and void.

2. THE DECISION BELOW AFFORDS AN UMBRELLA OF PROTECTION, OR LOOPHOLE, FOR ILLEGAL AND DISCRIMINATORY ACTS, AND CIRCUMVENTS THE SPIRIT AND INTENT OF THE LAW.

It was certainly not the intent of the Baltimore City Council and Mayor, when they enacted ART-4 of the City Charter to on one hand declare it illegal to discriminate in physical rejection of employees, and at the same stroke of the pen mean for someone like the B & O R.R. Co. to violate the law and evade compliance through the 180 day statute. The issues are clear in the case of Owens v. B & O R.R. Co., the railroad is continually and still to this very day continues on a daily basis to discriminate, by saying "we are not allowing Owens to return to work because of his physical condition."

Their illegal act must therefore be of a continuous nature, and not that of a onetime single and complete act, so they cannot invoke any time-barring action.

3. IT WOULD BE IN THE PUBLIC INTEREST FOR THIS WRIT TO BE GRANTED.

If a segment of our population, the physicall handicapped, cannot pursue active gainful and self-supporting employment, then it becomes the financial burden of the taxpayers to support the handicapped person and dependent family (if he has any) through tax-supported social programs. So it would be in the public interest if people with injuries are allowed an equal opportunity to employment, it lets the individual lead a more useful and productive life, and spares society as a whole from being taxed. It is the moral if not legal responsibility of employers to hire handicapped people for their abilities, not their disabilities.

## CONCLUSION

The Baltimore Circuit Court erred when it ruled Owens' charge of discrimination was time-barred, and the Maryland Court of Appeals also was wrong when it affirmed the decision. The only way these decisons are fair, is if Owens was discriminatory laid-off, for then it would be a single and complete act, and the charge would then be time-barred. But Owens is not held out of his job because of lay-off, but rather a continuing physical disqualification.

Judge Marshall A. Levin relied on case histories in his decison, (Law v. United 519 F2d171 10th circuit 1975) and (United v. Evans 431 U.S. 553 1977) and (Mobley v. Acme 473 F. Supp. 851 D MD 1977). Quoting Judge Levin, "In lay off situations" as he referred to all of the above. He was in error when he applied these cases to Owens as Owens was not laid off. Rather he was held out of service for physical injuries he sustained in a traffic accident.

Clearly continuing discrimination and therefore the discrimination charges by Owens cannot be time-barred.

Respectfully Submitted,

Wayne T. Owens
1751 Covington Street
Baltimore, Maryland 21230
INPROPER PERSON

## APPENDIX A

BEFORE THE BALTIMORE
COMMUNITY RELATIONS COMMISSION

| | | |
|---|---|---|
| BALTIMORE COMMUNITY RELATIONS COMMISSION, | ) | |
| In the Matter of: | ) | |
| Wayne Owens, | ) | Case No. E78C103(PD)-29 |
| Complainant, | ) | |
| v. | ) | |
| THE BALTIMORE AND OHIO RAILROAD COMPANY, | ) | |
| Respondent. | ) | |

## FINDINGS OF THE HEARING TRIBUNAL

In the matter of Wayne Owens, Complainant, vs. The Baltimore and Ohio Railroad Company, Respondent, the panel of commissioners (Dorsey, Chairperson, Parrish and Wright) find in support of the Complainant's claim of discrimination because of his physical disability in the terms and conditions of his employ. The panel finds that this discrimination has been continuous since January 26, 1978, in that:

1. Reinstate Mr. Owens inhis job as Machinist.

2. Place him on the Journeyman roster at the first level above the first person to be moved from the apprentice roster to the Journeyman roster after January 30, 1978, and to return to him all benefits and privileges which may have accured from the date of that individual's move up on the roster (in other words the person whose place Mr. Owens should have had at the head of the apprentice roster) including but not limited to retirement, sick leave and vacati

Mr. Elias Dorsey
Chairperson

Mr. William Parrish
Commissioner

Mrs. Nancy Wright
Commissioner

## APPENDIX B

| | | |
|---|---|---|
| BALTIMORE COMMUNITY RELATIONS COMMISSION VS. BALTIMORE AND OHIO RAILROAD COMPANY | ) | IN THE CIRCUIT COURT FOR BALTIMORE CITY CASE: 83334006/E13758 |

## REPORT AND RECOMMENDATION

Subject of Hearing: Motion Raising Preliminary Objection (Paper No. 4)

Date of hearing: March 7, 1984

Recommendation: Grant motion as to lack of capacity unless Petition is amended to substitute Mayor & City Council as plaintif

Deny as to subject matter jurisdiction.

REPORT

The Baltimore Community Relations Commission is an agency of the City of Baltimore under Article IV of the Baltimore City Code. It seeks to enforce an order passed by its hearing tribunal that directs the B & O Railroad Company to reinstate an employee. Seciton 20 (Enforcement) of Article IV provides:

(a) Certification of Complaint. In the event any respondent refuses to comply with an order of the Commssion (as to any matter other than those covered by Section 161(11) of this subtitle), or in the event, at any time after the filing of a complaint the Commission determines that the alledged unlawful practice will have become final and unrectifiable unless restrained, the Commission may certify the matter to the City Law Department.

(b) Court Proceedings. The City Law Department shall thereupon proceed, in the name of the Maynor and City Council of Baltimore as soon as reasonably possible, to invoke the aid of an appropriate court to secure compliance with the Commissions's order and with the provisions of

this subtitle, or to prevent final unrectifiable accomplishment of a practice designated as unlawf by this subtitle, as the case may be. The court shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter an order enforcing, modifying, and enforcing as so modified, or setting aside, in whole or in part, the order of the Commission.

The provision of the City Code clearly requi that the enforcement action be brought by the May and City Council. Unless the proper plantiff is substituted the Petition should be dismissed because of the Commission's lack of capacity to bring the action in its own name.

Several jurisdictional objections are raised by defendant. The first is that the complaint was filed and received by the Commission well beyond the 180 day limitation period set forth in Article IV, section 16(5) of the Baltimore City Code. Wayne Thomas Owens filed his complai of employment discrimination base on physical disability with the Commission on March 31, 1978. (Exhibit A to the Petition.) He asserted the

following: I am a Mechanic and I have been on sick disability leave since 1962. Prior to going on leave, I had been employed for approximately eight years. In 1962 I was injured in accident (non-occupational) and was unable to work for approximately 14 months. Following this 14 month period, mypersonal physician, Dr. David Weinberg, who was familiar with my duties as a mechanic issued a release for my return to work. The company's medical department, after examining me told me that I had to remain on sick disability status because I still had hardware (pin, plates, etc.) in my leg.

Since 1962, I have made several attempts to return to work. My most recent attempt was made during February and March, 1978. I made this attempt because all of the hardware that was present in myleg had been removed. I was examined by Dr. Mendel, company medical department, and Dr. Filtzer, Orthopedic Surgeon. Dr. Carouge, who is head of the company medical department told me that I coult not return to work because Dr. Filtzer did not feel that I could perform the work of a mechanic.

Owens was employed by B & O railroad in 195[illegible] and held the position of machinist's helper when he was placed on (unpaid) disability leave in JULy, 1962. He suffered numerous fractures to h[illegible] right leg and ankle in a motorcycle accident. In February 1966 Owens attempted to return to work, but the company refused to accept him back at that time based on the condition of his right leg. The employer contends that this 1966 decision not to reinstate Owens triggered the running of the 180-day responds that the limitation period for Owens' complaint should date fr[illegible] January 1978 (less than two months prior to his filing a complaint when Owens again requested reinstatement and was rejected after another physical examination.

B & O Railroad argues that its refusal to reinstate Owens in 1978 was merely a reconfirmat[illegible] of its 1966 decision. It relies on several feder[illegible] cases in which employers' not reinstate employees were held to be time-barred, rather than continuing acts. Layoffs and terminations are completed acts on a definite

date, while hiring and promotion refusals may be continuing in nature.

Placement on disability status and refusal to recall an employee may be analogous to layoff if the disability is an unchanging conditions, such as permanent blindness or paralysis. However Owens'leg injury has healed ot some degree since his 1962 injury. A factual issue exists regarding the degree of impairment in 1978. When Owens was rejected for reinstatement in 1966 he still had pins and plates in his right leg. This "hardware" was removed in 1971. It is concluded by the Master that the possibility of a significant improvement in Owens physical condition between 1966 and 1978 presents a situation distinguishable from the reinstatement cases cited by defendant. It cannot be concluded based on the pleadings that Owens' complaint filed in March 1978, soon after the January rejection of his bid for reinstatement, is time-barred.

Section 20 of Article IV of the Baltimore City Code requires that enforcement proceedings be brought by the Mayor and City Council "as soon as reasonably possible." The Community Rleations Commission issued its order on December 21, 1981.